89-194

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

HENRY VANCE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether the court below misconstrued Federal Rule of Evidence 404(b) in affirming the admission of a substantial body of evidence relating to uncharged and unrelated misconduct by petitioner where such evidence was used to negate petitioner's good reputation and thereby assist "the jury to understand" how a man of "social and political prominence" "could possibly be motivated to assist" in the commission of any crime.

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Henry Vance hereby petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 871 F.2d 572 (6th Cir. 1989). The district court's memorandum opinion and order, ruling on the government's motion in limine (App., *infra*, 30a-41a), is not reported. The district court's memorandum opinion and order, ruling on petitioner's motion for a new trial (App., *infra*, 15a-29a), is not reported.

JURISDICTION

The opinion of the court of appeals was entered on April 4, 1989, and a petition for rehearing was denied

(App., *infra*, 42a) on June 6, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Evidence 404(b) provides that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Fed. R. Evid. 404(b).

STATEMENT

Petitioner was indicted in the United States District Court for the Eastern District of Kentucky on one count of conspiracy in violation of 18 U.S.C. § 371 and one count of aiding and abetting in the transportation of a firearm in interstate commerce to commit a felony, in violation of 18 U.S.C. § 924(b). Following trial by a jury, petitioner was convicted on both counts and sentenced to five years imprisonment on the first count (18 U.S.C. § 371) and ten years imprisonment on the second count (18 U.S.C. § 924(b)), to be served consecutively for a total of 15 years.

In essence, the indictment charged that petitioner conspired with Bonnie Kelly and Stephen Vance Taylor to bring about the death of Florida Assistant State Attorney, Eugene Berry, who had successfully prosecuted Bonnie Kelly's husband, and that petitioner provided Kelly with the gun used to shoot Berry. Kelly, an unindicted co-conspirator, was the government's star witness. The trial testimony required the jury to make a choice between two entirely irreconcilable versions of events—Kelly's or petitioner's. Petitioner—a former deputy sheriff and

prominent citizen of Lexington—consistently denied conspiring with or providing a weapon to Kelly.[1] Because there were no witnesses, other than Kelly and petitioner, to the criminal acts alleged, the trial turned entirely on the credibility and character of these two individuals.

1. Three days prior to the beginning of trial, the United States filed a motion in limine seeking permission to introduce a substantial amount of evidence relating to prior, unchanged bad acts of the petitioner. See R.68: Motion of United States for Pretrial Ruling on Admissibility of Certain Evidence. Pursuant to Fed. R. Evid. 404(b), the government asked permission to introduce evidence of the following wrongful conduct by petitioner and his alleged co-conspirators:

1. use of illegal drugs in the early 1970's;
2. manufacture of fake LSD pills by petitioner and Kelly in 1972;
3. theft of a machine-gun from the sheriffs' office in the early 1970's;
4. theft of drugs from Lexington drug stores by the Kellys between 1974-76;
5. detonation of a bomb in the yard of a county judge in 1972;
6. theft of a machine-gun from the Lexington police impoundment lot in 1980;
7. manufacture of illegal gun silencers in 1981;
8. petitioner's receipt of false identification manufactured by the Kellys;
9. petitioner's forgery of the sheriff's signature in 1973 on an order for police weapons.

App., *infra*, 3a, 34a.

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[1] Petitioner had served in various capacities in Kentucky government, including as a legislative aide and assistant to the Governor. At the time in question, petitioner was an aide to the Majority Leader of the Kentucky House of Representatives.

According to the government, this highly prejudicial and wholly collateral evidence was needed to establish the "motive" for petitioner to provide Kelly with a gun:

> [t]he prosecution contended that in order for the jury to understand how Vance, a citizen of apparent standing, could possibly be motivated to assist Bonnie Kelly in the murder of prosecutor Berry, it had to be aware of the long-standing relationship between Vance and the Kellys during which the three of them had been involved in the myriad criminal activities alleged.

App., *infra*, 4a. Petitioner strenuously opposed this motion, arguing that such evidence would in fact be admitted for the one purpose flatly prohibited by Fed. R. Evid. 404(b)—to demonstrate that petitioner had acted in a manner consistent with his "criminal" character.

The district court, however, ruled that the "bad acts" evidence could be admitted, with the exception of items 1, 4 and 9. App., *infra*, 38a-39a. The district court stated:

> the government desires to "*set the scene*" for the *motive* of the defendant, a man of social and political prominence, to supposedly supply a weapon to a confederate to murder a state prosecutor. Much of the government's prior act evidence attempts to show *why* the defendant would risk his high social and political prominence by becoming involved in a murder. Any murder! The alleged criminal relationship between the unindicted co-conspirators and Vance is probative on the issue of *motivation* in the transfer of the pistol. There is little question that much of the prior act evidence . . . is prejudicial to the defense. However, the burden is on the Court to determine if this prejudice is *unfair*.

App., *infra*, 37a (emphasis in original). The district court determined that the prejudice was not unfair because "[e]ither all of the evidence about the murder weapon and the prior bad acts will be believable or all the evidence will be rejected by the jury." *Id.* at 37a-38a.

Accordingly, 15 government witnesses testified at trial to the enumerated instances of uncharged "bad acts" by petitioner and his friends and associates.[2] The United States took full advantage of the effect of this testimony on the jury's view of petitioner's character. In closing argument, the prosecution used the "bad acts" evidence —which purportedly had been admitted solely to establish "motive"— to argue that petitioner's criminal propensity could be demonstrated by his prior criminal "associations." The government argued:

> Henry Vance was just like Mike Kelly. He was his partner in crime . . . . When you consider what Mike Kelly was, and when you consider that these people were his friends, not only Henry Vance, but you heard about Drew Thornton, you heard about what kind of fellow he was . . . . How do you get friends like that? How does that happen? How do you surround yourself with people like that? Not by accident. Not by mistake. It happens by design. It happens by the fact that you surround yourself with people that are like you. We all do. We all associate with people that are like ourselves.

App., *infra*, 13a, n.2. Following return of the jury's verdict, petitioner moved for a new trial primarily on the ground that the "bad acts" evidence had been improperly admitted and used at trial. The court denied the motion. See App., *infra*, 38-41a.

2. A divided panel of the Sixth Circuit affirmed, rejecting petitioner's argument that the "bad acts" evidence

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[2] In addition to the six uncharged acts discussed in the United States' pretrial motion, the government also introduced evidence that petitioner had associated with and cashed a check for Andrew Thornton, a "notorious drug dealer." Eleven of the 15 witnesses who testified regarding petitioner's prior "bad acts" testified exclusively on collateral "bad acts" issues. Over 2000 pages of the trial transcript are devoted solely to allegations of the uncharged prior misconduct spanning a period of ten years prior to the occurrence of the charged offense and 15 years prior to trial.

"went to his character and propensity to engage in criminal activity, not to 'motive.'" App., *infra*, 7a. According to the majority, Rule 404(b) is a "rule of inclusion rather than exclusion, since only one use [of "bad acts"] testimony is forbidden . . . ." App., *infra*, 6a. Thus, as long as (1) the evidence was, in some way, "probative of Vance's motive"; and (2) its prejudicial effect did not outweigh its probative value, then the evidence properly was admitted. App., *infra*, 7a.

The majority concluded that the district court was correct in its determination that the evidence was probative of petitioner's "motive." The majority stated:

> [i]n order for the prosecution to prove its case, it had to show why this well-known citizen of considerable public standing and prominence, and a former law enforcement officer, could have been motivated to assist Bonnie Kelly in the commission of Berry's murder. . . . In showing the specific nature of Vance's relationship with the Kelly's—by showing the alleged prior bad acts he committed with them—the prosecution sought to show that Vance indeed might have been motivated to do all he could to assist the Kellys, including assisting Bonnie Kelly in the commission of Berry's murder.

App., *infra*, 7a.

With respect to the balancing of the prejudicial impact and probative values of the evidence, the court simply stated that "the prosecution's need for the evidence" is an "important indication of probative value." App., *infra*, 8a. In the absence of the evidence of petitioner's prior bad acts in this case, "the prosecution would have been hard-pressed to present a credible case explaining why a citizen of Vance's prominence would ever have become involved with Kelly in *any* crime, let alone a murder." *Id.* at 9a (emphasis in original). Thus, given the "need" for the evidence, the majority concluded that it was probative, and although it was also prejudicial, it was not "unfairly" prejudicial. *Id.*

Judge Gibson, in dissent, stated that "the majority both misconstrues and misapplies Rule 404(b)." App., *infra*, 12a. According to Judge Gibson, "[u]nder Rule 404(b), motive must indicate a causal relationship between the prior bad act and the charged criminal act." *Id.* Here, the evidence of unrelated prior bad conduct "was not evidence of motive to commit the crime for which the defendant was convicted." *Id.* Rather, the evidence of criminal propensity "in this case tends to eliminate a reason for not committing a crime"—*i.e.*, petitioner's good character, spotless record and standing in the community. *Id.*[3]

The dissent emphasized that the outcome reached by the majority reflected a misunderstanding of the requirements of Rule 404(b). The majority adopted a "liberal construction of 'motive'" which focused exclusively on the prosecution's "need" for the evidence. Such "need" might indicate that the evidence is "material," but, according to Judge Gibson, Rule 404(b) requires more. "[W]ithout a rational connection between the evidence and the proposition that the government needs to prove [*i.e.*, "motive"], the evidence cannot be admissible under Rule 404(b)." App., *infra*, 13a.

REASONS FOR GRANTING THE PETITION

The court of appeals has decided an issue of recurring and fundamental importance in the conduct of federal criminal trials in a way that is flatly inconsistent with Congress' intent as reflected in the Federal Rules of Evidence and with the decisions of other courts of appeals.

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[3] According to the dissent, the "prior crimes evidence is not even probative." App., *infra*, 12a. Instead, the government was permitted to use the evidence of prior misconduct to suggest that "because of past criminal activity, the likelihood of present guilt was strong." *Id.* Such an argument is "pure disposition evidence in its most egregious form and is inadmissible under Rule 404(b)." App., *infra*, 12a.

The Sixth Circuit's analysis of prior misconduct evidence permitted the United States to establish and argue the exact inference which Rule 404(b) prohibits—*viz.*, that an individual who has engaged in misconduct in the past is more likely to have acted consistently with his criminal propensity and thereby to have committed the crime for which he is charged. The Court should grant this petition in order to provide needed guidance to the lower courts on the appropriate standards for the admission of evidence of a defendant's prior, alleged misconduct in a criminal trial.

1. It is a fundamental principle of American jurisprudence that "a defendant must be tried for what he did, not for who he is." *United States* v. *Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977), *cert. denied*, 439 U.S. 847 (1978); see *Robinson* v. *California*, 370 U.S. 660 (1962). The rules involving admission of evidence in a criminal trial of the defendant's character and prior conduct generally reflect this principle. See E. Imwinkelried, Uncharged Misconduct Evidence § 1.03 (1984). Because evidence of prior misconduct or bad character can tempt the jury toward a finding of guilt in the particular crime charged, such evidence is a "peril to the innocent." *People* v. *Zackowitz*, 172 N.E. 466, 468 (N.Y. 1930) (Cardozo, J.).

Accordingly, the common law has long adopted a policy against admission of evidence of a defendant's criminal disposition or bad character—not because of a lack of relevance but because of the risk that the jury will penalize the defendant based on the evidence of his bad character. See M. Graham, Handbook of Federal Evidence, § 404.05 (1986); 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 404(04), at 404-429 (1988); 1A Wigmore, Evidence § 58.2 at 1212 (Tillers rev. 1983) (risk of "condemnation irrespective of guilt of the pres-

ent charge").[4] This Court explained over 40 years ago, in *Michelson* v. *United States*, that

> [c]ourts that follow the common law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case in chief. The state may not show the defendant's prior trouble with the law, specific criminal acts or ill name among his neighbors, even though some facts might logically be persuasive that he is by propensity [the] perpetrator of the crime.

335 U.S. 469, 475-76 (1948); see *Spencer* v. *Texas*, 385 U.S. 554, 560-561 (1967) ("Because [evidence of prior crimes] is generally recognized to have potentiality for prejudice, it is usually excluded except when it is particularly probative in showing such things as intent . . .").

That common law policy is carried forward in Federal Rule of Evidence 404(b), which precludes use of evidence of "other crimes, wrongs or acts . . . to prove the char-

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[4] Evidence of prior misconduct so increases the likelihood of conviction that it is referred to as the "prosecutor's delight." *See* Comment, *Exclusion of Prior Acquittals: An Attack On The "Prosecutor's Delight,"* 21 U.C.L.A. L. Rev. 892, 896 (1974); Uncharged Misconduct Evidence § 1.04 at 8. Empirical evidence supports the widely-held belief that such evidence "will usually sink the defense without [a] trace." Elliot, *The Young Person's Guide to Similar Fact Evidence—I*, Crim L. Rev. 284 (1983). Studies by the London School of Economics and the Chicago Jury Project concluded that admission of evidence of uncharged misconduct "significantly increases the likelihood of a jury finding of liability or guilt." Uncharged Misconduct Evidence § 1.02 at 4; Comment, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 Yale L.J. 763 (1961); H. Kalven & H. Zeisel, The American Jury 160-179 (1966).

acter of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b). The rule, however, permits use of such evidence "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." In sum, "Federal Rule of Evidence 404(b) . . . generally prohibits the introduction of evidence of extrinsic acts that might adversely reflect on the actor's character, unless that evidence bears upon a relevant issue in the case such as motive, opportunity, or knowledge." *Huddleston* v. *United States*, 485 U.S. 681 (1988).

This relatively straightforward dichotomy has generated more reported decisions than any other rule of evidence. 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 404(08), at 404-53. In many circuits, the admissibility of such evidence is the most frequently litigated issue on appeal (22 C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5239 (1978)) and, in some jurisdictions, the erroneous admission of such evidence is the single largest cause of reversals. Note, *Evidence—The Emotional Propensity Exception*, Ariz. St. L.J. 153, 156 n.29 (1978). Plainly, the Sixth Circuit is not such a jurisdiction. To the contrary, that court has adopted an extreme interpretation of Rule 404(b) which should be reviewed by this Court in order to establish some check on the admissibility in federal criminal trials of this extraordinarily prejudicial evidence.

2. Although the Sixth Circuit's decision in this case repeatedly states that the "bad acts" evidence was admitted to show petitioner's "motive," the majority's reasoning reflects how Rule 404(b) has been misconstrued to allow use of prior misconduct for the improper purpose of illuminating the "character" of a criminal defendant and his "propensity" towards crime. Such an analysis is flatly contrary to Congress' intent, as reflected in the exclusionary policy of Rule 404(b). See Wright & Graham, § 5239, at 434-435.

The primary error in the majority's analysis is its equation of petitioner's good character, good reputation and lack of a criminal record with the absence of any "motive" to commit the crime.

> In order for the prosecution to prove its case, it had to show why this well-known citizen of considerable public standing and prominence, and a former law enforcement officer, could have been motivated to assist Bonnie Kelly in the commission of Berry's murder. . . .

App., *infra*, 7a. Stated differently, the government feared that the jury would reason that a "good" person had no "motive" to provide Bonnie Kelly with a gun. Therefore, the court admitted evidence of prior misconduct so that the jury could reach the opposite inference—that petitioner was in fact a "bad" person who had engaged in criminal activity in the past and was likely to have done so in this case.

Obviously, the Sixth Circuit has stretched the meaning of the term "motive" beyond reason. Motive generally refers to an "incentive for certain volitional activity." Wright & Graham § 5240, at 479. For example, the government may want to prove that the victim of a murder was a witness to a prior criminal act by the defendant. Such proof of defendant's motive for the murder increases the inference that (1) the defendant, and not someone else, committed the crime ("identity") and (2) the defendant had the intent to commit the crime. See Uncharged Misconduct Evidence § 3:15. By contrast, there is nothing in the prior misconduct proved in this case (*supra*, p. 3) that gives rise to an inference that petitioner intentionally provided a murder weapon to Bonnie Kelly. As both courts below explicitly held, the evidence of prior, uncharged acts in this case merely proved that petitioner might commit "*any*" crime, not that he had reason to commit the specific crimes charged here. This

misuse of highly prejudicial evidence is precisely what Congress intended to forbid in Rule 404(b).[5]

3. The Sixth Circuit's broadly inclusionary approach towards the admission of evidence of prior misconduct follows one of the two fundamentally inconsistent interpretations of Rule 404(b) that have developed in the courts of appeals. As several commentators have noted, the circuits have split between an "inclusionary" and an "exclusionary" approach to prior misconduct evidence. See Uncharged Misconduct Evidence § 2.30; Wright & Graham § 5239, at 435; Reed, *Admission of Other Criminal Act Evidence After Adoption of the Federal Rules of Evidence*, 53 Cincinnati L. Rev. 113, 159-160 (1984). "[T]he First, Second, Fourth, Fifth, Ninth, Tenth and Eleventh Circuits have . . . adopted the view that Rule 404(b) is an inclusionary rule . . . ." Reed, 53 Cincinnati L. Rev. at 159-160.[6] "[T]he District of Columbia, Seventh, and Eighth Circuits continue to look upon Rule 404(b) as embodying the traditional exclusionary rule with its more or less explicit list of identifiable exceptions." Reed, 53 Cincinnati L. Rev. at 160-161; Un-

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[5] It is possible to *hypothesize* various "motives" that might be tied to the facts of this case. For example, it might be assumed that petitioner was motivated to assist Kelly because she was blackmailing him with knowledge of his prior misconduct. In such a case, "threat of exposure" would constitute a "motive," as that term commonly is understood. However, no one ever argued—and Kelly did not testify—that petitioner was coerced or blackmailed into the alleged criminal conduct. Rather, the United States consistently has argued that petitioner was "motivated to assist" Bonnie Kelly in the crime simply because he had done so in the past.

[6] See *United States* v. *Moccia*, 681 F.2d 61, 63 (1st Cir. 1982); *United States* v. *D'Auria*, 672 F.2d 1085 (2d Cir. 1982); *United States* v. *Guerrero*, 650 F.2d 728, 733 (5th Cir. 1981); *United States* v. *Diggs*, 649 F.2d 731, 737 (9th Cir.), *cert. denied*, 454 U.S. 970 (1981); *United States* v. *Tisdale*, 647 F.2d 91, 93 (10th Cir.), *cert. denied*, 454 U.S. 817 (1981); *United States* v. *Dothard*, 666 F.2d 498, 501 (11th Cir. 1982).

charged Misconduct Evidence § 2:30, at 73-74.[7] The Sixth Circuit obviously has embraced the inclusionary approach with a vengeance.

In essence, an inclusionary analysis assumes that character evidence is admissible unless it is being admitted solely for the impermissible purpose of showing "action in conformity therewith." Rule 404(b). An exclusionary approach, by contrast, assumes that such evidence should be excluded unless it is relevant to an issue in dispute and the chain of inferences by which relevance is established does not depend upon any improper inferences of character or propensity.

Thus, courts which have adopted the inclusionary approach to Rule 404(b) have declared that the rule represents a "broad avenue" for the inclusion of evidence of misconduct as long as such evidence is not admitted solely and specifically for the purpose of proving character or propensity. See, *e.g.*, *United States* v. *Shaw*, 701 F.2d 367, 386 (5th Cir. 1983), *cert. denied*, 465 U.S. 1067 (1984) ("The rule is exclusionary *only* as to evidence admitted to establish bad character as such; it broadly recognizes admissibility of prior crimes for other purposes"). The Ninth Circuit has summarized the "inclusionary" approach as follows:

> This circuit has adopted the position that Rule 404 (b) is an inclusionary rule—*i.e.*, evidence of other crimes is admissible under this rule only when it proves nothing but the defendant's criminal propensity. . . . The district court is accorded wide discretion in deciding whether to admit such evidence.

United States v. *Diggs*, 649 F.2d 731, 737 (9th Cir.), *cert. denied*, 453 U.S. 970 (1981).

Those circuits that have adopted an exclusionary approach focus on the prejudicial impact of prior miscon-

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[7] See *United States* v. *Foskey*, 636 F.2d 517, 523-524 (D.C. Cir. 1980); *United States* v. *Fierson*, 419 F.2d 1020, 1022 (7th Cir. 1969); *United States* v. *Frederickson*, 601 F.2d 1358, 1365 (8th Cir.), *cert. denied*, 444 U.S. 934 (1979).

duct evidence and generally are reluctant to admit such evidence. The D.C. Circuit, for example, has stated:

> It is fundamental to American jurisprudence that "a defendant must be tried for what he did, not for who he is." That precept is . . . "[a] concomitant of the presumption of innocence." . . . Unless the Government can establish the relevancy of the evidence to some such issue in the criminal trial, the evidence must be excluded.

United States v. *Foskey*, 636 F.2d 517, 523 (D.C. Cir. 1980). In order to ensure that the relevance of the "bad acts" to the charged criminal activity is clear, courts applying the "exclusionary" standard impose the additional requirement that

> the other crimes evidence must relate to wrongdoing "similar in kind and reasonably close in time to the crimes charged at trial."

United States v. *Frederickson*, 601 F.2d 1358, 1365 (8th Cir.), *cert. denied*, 444 U.S. 934, (1979); see *United States* v. *Fierson*, 419 F.2d 1020, 1022 (7th Cir. 1969) (evidence of prior bad acts must be close in time and similar to offense charged).[8] Had such a requirement been applied in the instant case, the evidence relating to petitioner's prior misconduct—which was distant in time and unrelated in kind to the offense charged (*supra*, p. 3)—would have been excluded.

Indeed, the difference in analysis between the Circuits that follow an inclusionary approach (as illustrated by the Sixth Circuit's decision in this case) and an exclusionary approach would lead to different outcomes in a significant number of cases—including the present one. For example, the Seventh Circuit in *United States* v. *Shackleford*, 738 F.2d 776 (7th Cir. 1984), reversed a conviction which had been based in part upon the prosecution's use of prior misconduct evidence to establish

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[8] The *Fierson* case has been reaffirmed in Seventh Circuit decisions following the adoption of the Federal Rules of Evidence. See *United States* v. *Feinberg*, 535 F.2d 1004 (7th Cir.), *cert. denied*, 429 U.S. 929 (1976).

motive. The difference between the Seventh Circuit's analysis of this issue and that of the court below is striking.

In *Shackleford*, the defendant was convicted of attempting to collect a debt by extortionate means, in violation of 18 U.S.C. § 894. The prosecution was based on testimony of the victim, Eames, that defendant had repeatedly threatened him in an attempt to collect a drug debt over a period of time prior to the explosion of a pipe bomb at the victim's place of business. In support of its case, the government introduced evidence that, nine months prior to the explosion, the defendant had threatened another person, Davis, with a wrench in the course of attempting to collect a debt. The district court admitted the evidence and properly instructed the jury on the proper purposes for which the evidence could be considered. 738 F.2d at 780.

The court's consideration of the Rule 404 issue recognized that—as in this case—the "government's case . . . rested entirely on the testimony" of a single individual, "which was set against the word of [the] defendant." *Id.* at 783. The court also recognized that "emanations from evidence of a defendant's bad acts are almost always suggestive of a defendant's propensity to commit other bad or criminal acts and tend to impugn his or her credibility . . . ." *Id.* Accordingly, the court carefully scrutinized the chain of inferences which the government proposed to draw:

> The government contends that Davis' testimony is admissible because it "corroborates Eames' testimony that the defendant's motive in the bombing was the collection of a debt." But the defendant never argued that he took part in a bombing unrelated to the [collection of a debt]. Defendant denied participating in the bombing altogether or even threatening one. . . . The testimony did not serve to buttress directly any key points of Eames' testimony, since the two events were entirely unrelated.

Shackleford, 738 F.2d at 782.

Thus, the court rejected the government's explanation that the evidence was relevant to motive:

> the question is whether defendant's previous drug loan to Davis and his appearance at Davis' house with a wrench could *supply a reason* why defendant might have used the threat of force to obtain payment for a drug debt owed by Eames. We think it does not. The two events are entirely unrelated.

Id. at 782 (emphasis added). To the extent that the government intended to show that it was "more likely that defendant would use extortionate means to collect a drug debt" from Eames because he had been successful with his prior extortionate efforts, that is an argument "that relies on propensity, an impermissible basis for admitting extrinsic evidence under the rule." *Id.* at 782-783.

Had the Seventh Circuit's exclusionary approach, as reflected in the *Shackleford* case, been applied to petitioner's case, his conviction would have been reversed. Evidence of petitioner's unrelated and distant misconduct no more "suppl[ies] a reason" for petitioner's participation in the charged conduct than the prior acts in *Shackleford*. In fact, the Sixth Circuit in the instant case admitted the prior misconduct evidence for the same reason that was deemed impermissible in *Shackleford*: to show that it was "more likely" that petitioner would assist Bonnie Kelly in *any* criminal act because he had done so in the past.

This approach of taking a close—and skeptical—look at the use of prior misconduct evidence is well illustrated in another Seventh Circuit case, *United States* v. *Beasley*, 809 F.2d 1273 (1987). In that case, Beasley, a Ph.D in chemistry, had been convicted of possession of a controlled substance, with intent to distribute, and other drug offenses in a trial in which the government had introduced evidence of prior misconduct involving drug possession and distribution. The Seventh Circuit rejected

the United States' argument that the evidence was admissible for the appropriate purpose of proving a "pattern" because the prior acts were not "similar in the sense of demonstrating a modus operandi." 809 F.2d at 1277.

At bottom, the court concluded that the trial court did not take "into account the power of this bad act evidence to impugn Beasley's character." *Id.* at 1279. As in this case—where the government and both courts below candidly admit that the bad acts evidence was necessary to counter petitioner's "social and political prominence" (*supra*, pp. 4-5)—"[t]he effect on Beasley's character may well have been the dominant [reason] . . . why the prosecutor wanted to use the evidence." *Id.* at 1279. As in this case,

> [because] Beasley's Ph.D. and scientific achievements might suggest to the jury that Beasley had a good character, the prosecutor wanted something that cut the other way.

Id. at 1279-1280. The Seventh Circuit, however, recognized that such a use of bad acts evidence was impermissible and reversed the conviction.

Finally, the District of Columbia Circuit's analysis of prior misconduct evidence in *United States* v. *Foskey*, 636 F.2d 517 (1980) illustrates clearly how the conflicting analytical approaches in the circuits lead to conflicting results. In *Foskey*, the government introduced evidence that the defendant, who was on trial for possession with intent to distribute controlled substances, previously had been in the company of his current codefendant when that codefendant had been arrested for possession of drugs. The D.C. Circuit rejected the United States' argument that such evidence was admissible to show the defendant's "intent" to possess drugs. According to the court, Rule 404(b) was

> designed to ensure a defendant a fair trial based upon the evidence presented, not upon impermissible inferences of criminal predisposition or by confusion of the issues.

636 F.2d at 525. Accordingly, the court "carefully searched the record in th[e] case" to determine whether there was any evidence that "satisfactorily links the two incidents for purposes of Rule 404(b)." *Id.* at 524.

The court found no such evidence and concluded that "[t]he mere fact that a person was in the company of another who possessed drugs simply is not sufficient to justify a conclusion that he himself knowingly possessed drugs two-and-one-half years later." *Id.* The circumstances of the prior arrest were so "dissimilar from the crime for which defendant was on trial" that no proper chain of inference could be drawn and the bad acts evidence was held to have been improperly admitted. Had the same searching inquiry into relevance been applied in this case, it would have been apparent to the majority, as it was to the dissent, that "there is no rational connection between defendant's production of fake LSD in the seventies and defendant's alleged assistance in Berry's murder." App., *infra*, 12a, n.1.

Because of the likelihood that prior bad acts evidence will have a substantial, if not a determinative, impact in criminal trials (as it unquestionably did in this case) and because of the clear diversity of opinion among the courts of appeals concerning the proper construction and application of the standards of admissibility of evidence under Fed. R. Evid. 404(b), this Court should grant this petition to review the extreme inclusionary approach adopted by the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 87-6276

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HENRY VANCE,
Defendant-Appellant.

On Appeal from the United States District Court for the Eastern District of Kentucky

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Decided and Filed April 4, 1989

Before: JONES and RYAN, Circuit Judges; and GIBSON,* District Judge.

RYAN, Circuit Judge, delivered the opinion of the court, in which JONES, Circuit Judge, joined. GIBSON, District Judge, (pp. 12-14) delivered a separate dissenting opinion.

RYAN, Circuit Judge. Henry Vance appeals his conviction of conspiring to transport a firearm in interstate commerce with knowledge that it was to be used to commit murder, 18 U.S.C. 371, and of transporting a firearm in interstate commerce with knowledge that it was to be used to commit murder, 18 U.S.C. § 924(b). On

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* The Honorable Benjamin F. Gibson, United States District Judge for the Western District of Michigan, sitting by designation.

appeal, Vance argues that he is entitled to a new trial on the ground that the district court committed an abuse of discretion by admitting into evidence, under Fed. R. Evid. 404(b), evidence of prior bad acts allegedly committed by Vance. Vance also argues that the district court committed an abuse of discretion by admitting certain expert testimony, and that prosecutorial misconduct denied Vance a fair trial.[1] Finding no reversible error, we affirm Vance's conviction.

This case arose from the murder of Florida State Attorney Eugene Berry by Bonnie Kelly on January 16, 1982. Berry was the prosecutor in the 1981 Florida trial of Bonnie Kelly's husband, Wallace M. ("Mike") Kelly, in which Mike Kelly was convicted and sentenced to imprisonment on drug charges. The indictment of Vance charged that he, Bonnie Kelly, and Stephen Vance Taylor (no relation to Henry Vance), who was scheduled to be prosecuted by Berry on drug charges, planned Berry's murder between late December 1981 and January 16, 1982, and that Vance gave Bonnie Kelly the handgun she used to murder Berry at Berry's home in Florida. The indictment also alleged that Vance assisted Taylor and Bonnie Kelly in fabricating alibis for Berry's murder by helping Taylor stage a car accident in Kentucky on the date of the murder, and by telling law enforcement officials that he had seen Bonnie Kelly in Kentucky on that

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[1] In his appellate brief, Vance also argued that this court should reconsider its decision in *United States v. Huddleston*, 811 F.2d 974 (6th Cir. 1987) (*per curiam*), which adopted a preponderance of the evidence standard for the admission of prior bad act evidence under Fed. R. Evid. 404(b). Vance argued that proof of prior bad acts should be shown by clear and convincing, not merely preponderant, evidence. However, in a recent decision unanimously affirming *Huddleston*, the Supreme Court made clear that prior bad act evidence is admissible under Fed. R. Evid. 404(b) upon a showing by a preponderance of the evidence that the defendant committed the act. *Huddleston v. United States*, 485 U.S. ——, 99 L.Ed.2d 771 (1988). We therefore decline Vance's request to reconsider *Huddleston*.

date. Bonnie Kelly was convicted in a Florida court of murdering Berry and she was sentenced to life imprisonment; Taylor pleaded guilty to second-degree murder and was sentenced to ninety-nine years' imprisonment.

Before Vance's trial, the prosecution moved for a ruling on the admissibility under Fed. R. Evid. 404(b) of evidence of the following prior bad acts which Vance allegedly committed or in which he was allegedly involved:

(1) Use of illegal drugs in the early 1970's;

(2) Production of fake LSD pills by Vance and Bonnie Kelly to replace pills stolen by Vance from the sheriff's office;

(3) Theft of a machine gun from the sheriff's office;

(4) Theft of drugs from drug stores by Mike Kelly and Bonnie Kelly;

(5) Detonation of a bomb on the property of a Kentucky judge in 1972 by Vance, Mike Kelly, Bonnie Kelly, and a fourth person;

(6) Theft of a machine gun from a police department impoundment lot in 1980 by Vance, Mike Kelly, and Bonnie Kelly;

(7) Illegal manufacture of gun silencer parts in 1981 by Vance and Mike Kelly;

(8) Production of false identification pieces by Mike Kelly and Bonnie Kelly, including pieces used by Vance;

(9) Forgery of sheriff's signature by Vance in 1973 to order police weapons.

The prosecution's rationale for the admissibility of evidence of these alleged acts was that the acts were relevant as tending to prove Vance's motive for assisting Bonnie Kelly in the murder of the prosecutor of Mike

Kelly. The prosecution contended that in order for the jury to understand how Vance, a citizen of apparent standing,[2] could possibly be motivated to assist Bonnie Kelly in the murder of prosecutor Berry, it had to be aware of the long-standing relationship between Vance and the Kellys during which the three of them had been involved in the myriad criminal activities alleged.

In a fourteen-page memorandum opinion and order, the district court ruled on the admissibility of evidence of the alleged prior bad acts. The court held that evidence of acts Nos. 1 and 4—Vance's alleged drug use and the Kellys' alleged drug thefts—was inadmissible because it was unfairly prejudicial, and stated: "Although such evidence is somewhat probative of the motive of Vance to act in connection with the Kellys, the prejudicial effect of the extensive drug use outweighs any use of the evidence." The court ruled that evidence of act No. 9, Vance's alleged forgery of an order for police weapons, was inadmissible because Vance allegedly committed this act by himself; therefore, it was not probative of his relationship with the Kellys.

The district court ruled that evidence of the six other alleged prior bad acts was admissible because the evidence was probative as to Vance's motive to assist Bonnie Kelly in the commission of Berry's murder, and was not unfairly prejudicial. The court stated:

> [T]he government desires to "*set the scene*" for the *motive* of the defendant, a man of social and political prominence, to supposedly supply a weapon to a confederate to murder a state prosecutor. Much of the government's prior act evidence attempts to show *why* the defendant would risk this high social and political prominence by becoming involved in a mur-

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[2] Vance had served in various capacities in Kentucky government, including as deputy sheriff, legislative aide, and assistant to the Governor. At the time of Berry's murder, Vance was an aide to the Majority Leader of the Kentucky House of Representatives.

> der. Any murder! The alleged criminal relationship between the unindicted co-conspirators and Vance is probative on the issue of *motivation* in the transfer of the pistol. There is little question that much of the prior act evidence, such as the furnishing of guns to the Kellys and the creation of "fake" LSD by the defendant and Bonnie Kelly is prejudicial to the defense. However, the burden is on the Court to determine if this prejudice is *unfair*. The jury must decide whether to believe the testimony of the defendant or the testimony of the Kellys. If the jury does not believe that Vance gave the gun to Bonnie Kelly to commit a murder,[3] then they will not believe the testimony of the Kellys as to prior bad acts. Either all of the evidence about the murder weapon and the prior acts will be believable or all the evidence will be rejected by the jury.
>
> ---
>
> [3] The motive of giving the gun for this illegal purpose is in sharp contrast to any innocent reason for furnishing the weapon.

Evidence of six alleged prior bad acts was therefore admitted at Vance's trial. After his conviction, Vance moved for a new trial, primarily on the ground that the evidence of alleged prior bad acts was inadmissible under Fed. R. Evid. 404(b) and 403. In a nineteen-page memorandum opinion and order the district court considered and rejected Vance's motion on the same rationale as the court's pretrial decision to admit the evidence: the evidence was probative as to Vance's motive for assisting the Kellys, and it was not unfairly prejudicial. This appeal followed.

I.

Vance's primary argument on appeal is that the district court erred in admitting evidence of alleged prior bad acts under Fed. R. Evid. 404(b). Rule 404(b) provides:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The rationale underlying the exclusion of bad acts evidence is *not* that such evidence is irrelevant.

> [O]n the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

Micheleson v. United States, 335 U.S. 469, 476 (1948). By limiting the admission of bad acts evidence, Rule 404(b) therefore helps secure the presumption of innocence and its corollary "that a defendant must be tried for what he did, not for who he is." *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977), *cert. denied*, 439 U.S. 847 (1978).

Rule 404(b), however, provides only that bad acts evidence is not admissible to prove character or criminal propensity; such evidence may be admissible for other purposes, "*such as*," but not limited to, those listed in the rule. This court has noted that Rule 404(b) "is actually a rule of inclusion rather than exclusion, since only one use is forbidden and several permissible uses of such evidence are identified." *United States v. Blankenship*, 775 F.2d 735, 739 (6h Cir. 1985).

In determining whether bad acts evidence is admissible under Rule 404(b), a court must engage in a two-step analysis.

> First, the court must decide whether the evidence would serve a permissible purpose such as one of those listed in the second sentence of Rule 404(b). If so, the court must consider whether the probative value of the evidence is outweighed by its potential prejudicial effect.

United States v. Huddleston, 811 F.2d 974, 976 (6th Cir. 1987) (*per curiam*; citations omitted), *aff'd*, 485 U.S. ——, 99 L.Ed.2d 771 (1988). In determining the admissibility of bad acts evidence under Rule 404(b), a trial judge is accorded "broad discretion." *United States v. Ebens*, 900 F.2d 1422, 1433 (6th Cir. 1986); *United States v. Fraser*, 709 F.2d 1556, 1559 (6th Cir. 1983).

In this case, the district court engaged in the Rule 404(b) two-step analysis and found first that the evidence of the alleged bad acts in question was offered for a proper purpose—to show Vance's motive for assisting Bonnie Kelly in the murder of prosecutor Berry. The court then found that the evidence did not unfairly prejudice Vance. On appeal, Vance disputes both of these findings: He claims that (1) the evidence went to his character and propensity to engage in criminal conduct, not to "motive"; and (2) in any event, the prejudicial effect of the extrinsic evidence outweighed any probative value. We are persuaded that the district court did not commit an abuse of discretion in admitting the evidence of the six prior bad acts.

First, we find that the prior bad acts evidence was probative of Vance's motive, a permissible purpose for admission of the evidence under Rule 404(b) and a material issue in the case. In order for the prosecution to prove its case, it had to show why this well-known citizen of considerable public standing and prominence, and a former law enforcement officer, could have been motivated to assist Bonnie Kelly in the commission of Berry's murder. The importance of motive to the case

was recognized by defense counsel, who stated in closing argument:

> They haven't got any motive. There is no motive for Henry Vance to want that prosecutor killed. . . . No motive on his part.
>
> When there is no motive, ladies and gentlemen, it's hard to prove a reason why a person would want to commit a crime and there's a likelihood that the person would not commit that crime, a great likelihood. So what do they do to try to fill in that gap. They try to say that the motive in this case is friendship. Because he is a friend to Mike Kelly, he's going to get a gun, give it to—volunteer the gun.

Tr. 8-68. In showing the specific nature of Vance's relationship with the Kellys—by showing alleged prior bad acts he committed with them—the prosecution sought to show that Vance indeed might have been motivated to do all he could to assist the Kellys, including assisting Bonnie Kelly in the murder of the prosecutor of Mike Kelly. *Cf. United States v. White*, 788 F.2d 390 (6th Cir. 1986).

Second, we find that the district court did not commit an abuse of discretion in holding that the probative value of the evidence of alleged prior bad acts was not outweighed by its potential prejudicial effect. A district court is granted "very broad" discretion in determining whether the danger of undue prejudice outweighs the probative value of the evidence—a Fed. R. Evid. 403 inquiry. *United States v. Vincent*, 681 F.2d 462, 465 (6th Cir. 1982). Thus, whether this court might have reached a different conclusion in a trial *de novo* is irrelevant if the district court acted within is discretion. *Id.*

An important indication of probative value of evidence is the prosecution's need for the evidence in proving its case. *United States v. Benton*, 637 F.2d 1052, 1057 (5th

Cir. 1981). In this case, the prosecution undoubtedly had a strong need for the evidence of the alleged prior bad acts—without evidence of the specific nature of Vance's relationship with the Kellys, the prosecution would have been hard-pressed to present a credible case explaining why a citizen of Vance's prominence would ever have become involved with the Kellys in *any* crime, let alone a murder. As for the prejudicial effect of the bad acts evidence, we note that evidence of prior bad acts is almost always prejudicial to the defendant. At issue, however, is whether such evidence is *unfairly* prejudicial to the defendant such that

> [t]he jury's decision will be based upon improper factors, notably the character and past conduct of the accused, rather than upon the evidence presented on the crime charged. The prejudicial effect of the evidence may be reduced by the manner in which the evidence is introduced, *e.g.*, elimination of inflammatory or unnecessary details from the presentation, and by cautionary instructions from the trial judge.

Id. In this case the district court excluded evidence it considered inflammatory, including Vance's alleged drug usage, and the court gave a cautionary instruction to the jury that it only consider the evidence of prior bad acts on the issue of motive. We find no abuse of discretion by the district court in its finding that the probative value of the bad acts evidence was not outweighed by its potential prejudicial effect.

The district court made a reasoned determination that some, but not all, of the prior bad acts evidence offered by the prosecution was probative of Vance's motive, a material issue, and that the probative value of this evidence was not outweighed by its prejudicial effect. We find no abuse of the broad discretion accorded a trial court in making this determination, and we affirm the district court's admission of prior bad acts evidence under Fed. R. Evid. 404(b).

II.

Vance challenges the district court's admission into evidence of testimony of expert witness Andrea Hillyer, Assistant General Counsel to the Governor of Florida, as to the operation of clemency in Florida and her opinion of the unlikelihood that Bonnie Kelly or Stephen Vance Taylor would be granted clemency in exchange for their testimony at Vance's trial. The admissibility of expert testimony is governed by Fed. R. Evid. 702, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

This court has established a four-part test for determining admissibility of expert testimony under Rule 702: (1) a qualified expert; (2) testifying on a proper subject; (3) in conformity to a generally accepted explanatory theory; (4) the probative value of which outweighs any prejudicial effect. *United States v. Green*, 548 F.2d 1261, 1268 (6th Cir. 1977). Vance argues that Hillyer's testimony as to the operation of clemency in Florida was not on a proper subject and therefore failed part two of the test.

A district court has broad discretion to admit expert testimony under Rule 702: "Traditionally, the permissible limits of expert testimony are left to the sound discretion of the District Court and the decision to permit testimony will not be disturbed on appeal unless it is manifestly erroneous." *United States v. Brown*, 557 F.2d 541, 556 (6th Cir. 1977). Because defense counsel first raised the issue of clemency by implying that Bonnie Kelly and Stephen Vance Taylor might obtain clemency in exchange for their testimony at Vance's trial, we can-

not say it was manifestly erroneous to allow the prosecution to introduce Hillyer's testimony as to the unlikelihood of such an event in light of past practice. We affirm the district court's admission of Hillyer's testimony.

III.

Vance's final argument before this court is that prosecutorial misconduct and improper argument denied him a fundamentally fair trial. Based on extensive review of the record, we conclude that alleged prosecutorial misconduct was not "so pronounced and persistent that it permeate[d] the entire atmosphere of the trial," *United States v. Mahar*, 801 F.2d 1477, 1503 (6th Cir. 1986), nor were alleged improprieties in the prosecution's argument to the jury "so gross as probably to prejudice the defendant." *United States v. Ashworth*, 836 F.2d 260, 267 (6th Cir. 1988). Accordingly, we hold that any improper conduct or argument by the prosecution constitutes harmless error and does not warrant a new trial.

AFFIRMED.

GIBSON, District Judge, dissenting.

The majority today allows the admission of evidence of prior crimes allegedly committed by defendant with Bonnie and Mike Kelly in order to prove "motive." However, in my judgment, the majority both misconstrues and misapplies Rule 404(b). As a result, this evidence may well have influenced the jury into inferring the defendant's guilt from his propensity for crime. Because this violates both the terms of Rule 404(b) and its underlying policies, I dissent.

Motive has been defined as "the reason that nudges the will and prods the mind to indulge the criminal intent." *United States v. Benton*, 637 F.2d 1052, 1056 (5th Cir. 1981) (citing *United States v. Beechum*, 582 F.2d 898, 912 (5th Cir. 1978)). The prior crimes testimony was not evidence of motive to commit the crime for which the defendant was convicted. Under Rule 404(b), motive must indicate a causal relationship between the prior bad act and the charged criminal act. *See United States* v. *Gonzales*, 610 F.Supp. 574, 576 (D.P.R. 1985); E. Imwinkelreid, *Uncharged Misconduct Evidence* § 3.15, at 36 (1984). The articulated motive in this case tends to eliminate a reason for not committing a crime, rather than "prodding the mind to indulge the criminal intent."

Moreover, the prior crimes evidence is not even probative.[1] The government simply wanted to show that because of past criminal activity, the likelihood of present guilt was strong. Of course, this is pure disposition evidence in its most egregious form, and is inadmissible under Rule 404(b).

The majority, citing *Benton*, 637 F.2d at 1057, suggests that the prior crimes evidence is probative because of "the prosecution's need for the evidence in proving

[1] For example, there is no rational connection between defendant's production of fake LSD in the seventies and defendant's alleged assistance in Berry's murder.

its case." In *Benton*, there was a specific showing that demonstrated how the prior crimes created the motive for the charged crime. The prosecution's legitimate need for evidence on an issue might reflect that issue's materiality, but such need cannot, by itself, warrant the admission of otherwise inadmissible evidence. To hold otherwise would permit the admission of evidence by the government by simply demonstrating a need for such evidence. However, without a rational connection between evidence and the proposition that the government needs to prove, the evidence cannot be admissible under Rule 404(b).

Furthermore, the prior crimes evidence was remote in time. Most of these events occurred in the early seventies and none occurred later than 1981. The district court noted that these events were prejudicial, but found that they were not unfairly prejudicial. However, there is unfair prejudice in my opinion when the jury's attention is unduly focused on the defendant's propensity for crime. Fifteen of the witnesses in this case testified about the defendant's prior criminal acts. Over two hundred pages of trial transcripts were used to document these acts. The prosecution even urged the jury to infer guilt from defendant's association with criminals.[2]

Essentially, the defendant was tried for his previous criminal acts. Even under the majority's liberal construc-

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[2] The government made its position clear in closing argument:

> Henry Vance was just like Mike Kelly. He was his partner in crime. . . . When you consider what Mike Kelly was, and when you consider that these people were his friends, not only Henry Vance, but you heard about Drew Thornton, you heard about what kind of fellow he was, . . . How do you get friends like that? How does that happen? How do you surround yourself with people like that? Not by accident. Not by mistake. It happens by design. It happens by the fact that you surround yourself with people that are like you. We all do. We all associate with people that are like ourselves.

8 Trial Transcript at 31-32.

tion of "motive," Rule 403 would still dictate inadmissibility. Without a doubt, the probative value of the evidence was "substantially outweighed by the danger of unfair prejudice."

For these reasons, I dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Criminal No. 87-3

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HENRY VANCE,
Defendant.

MEMORANDUM OPINION AND ORDER

[Filed Nov. 20, 1987]

The defendant, Henry Vance, stands convicted of two counts of criminal conspiracy and its substantive offense of providing a firearm to be transported interstate for the unlawful purpose of assassinating a prosecuting attorney in the State of Florida. He now moves the court for a judgment of acquittal or, failing that, for a new trial.

The former motion is broader in scope and the lack of specificity is understandable; the motion alleges insufficient evidence to support the conviction and must be overruled for reasons that will become obvious herein.

The motion for a new trial deserves and has received the Court's very close attention. Numerous assignments of error are set out but the primary fire is directed to evidence admitted by Court pursuant to its pre-trial order entered on October 20, 1987, as it relates to prior "bad

acts" admitted into the evidence under the authority of Rule 404(b) of the Federal Rules of Evidence.

The government filed a pre-trial motion seeking to introduce nine (9) prior acts of the defendant for the stated, and necessary, purpose of establishing the defendant's *motive* in furnishing a pistol to Bonnie Gee Kelly for the *sole* purpose (not for any innocent reason) of taking the gun from Lexington, Kentucky, to Punta Gorda, Florida, to murder Eugene Berry. Mr. Berry had prosecuted her husband, Wallace McClure "Mike" Kelly on a drug charge. The Court agreed to admit six (6) of these acts that directly related to the past relationship between Vance and the Kellys. The Court excluded three (3) of the prior acts for the reason that neither of the Kellys was involved.

The defendant cites a number of cases as authority for a new trial based on the alleged misapplication of FRE 404(b) and FRE 403. The Court notes that prior acts evidence is one of the most litigated areas of evidence law and that many cases can be cited on both sides of this issue. Moreover, this litany of cases deals with "similar acts evidence" and not "prior bad acts" that relate to *motive* under Rule 404(b). However, the similarity to the crime in the indictment is not the basis for admission of the prior bad acts in this action. Similar acts evidence was admissible prior to the adoption of the Federal Rules of Evidence. *See, e.g., United States v. Ring*, 513 F.2d 1001, 1004 (6th Cir. 1975). After the adoption of the Federal Rules of Evidence, "[o]ther bad acts disclosed by evidence would have to be similar only if a basis for the relevance of the evidence is similarity." *United States v. Czarnecki*, 552 F2d 698, 702 (6th Cir. 1977); *see United States v. McFadyen-Snider*, 552 F.2d 1178, 1183 (6th Cir. 1977) ("However, Rule 404(b) is not to be interpreted mechanically, and under its flexible guidelines even dissimilar crimes can be admitted in certain special situations.").

In this action, the basis for the admission of the prior acts evidence goes to the motivation of the defendant in allegedly furnishing Bonnie Kelly with an untraceable gun so that she could kill a state prosecutor. While the Court has primarily relied upon *United States v. White*, 788 F.2d 390 (6th Cir. 1986), in its prior memorandum opinion allowing admission of some of the alleged prior bad acts, the defendant does not attempt to distinguish the *White* case and, in fact totally ignored it in the motion for new trial. The Court still believes that *White* and its analysis of prior acts evidence for the purpose of showing *motive* is controlling in the present action.

The *White* case involved a conspiracy to commit arson. A co-conspirator was permitted to testify, "extensively," about his relationship to the defendants on trial and this testimony included their prior bad acts and was admitted in order for the government to "set up the scene." These acts included prior and subsequent arson, "check kiting and phony American Express transactions." The opinion reasoned:

> [T]his prior arson was clearly relevant in that it tended to show *why* White would go to Castile about his "problem" and how he expected Castile to handle it. (*Id.* at 393. Emphasis added.)
>
> Similarly, the check kiting and American Express fraud tend to show that White and Castile owed each other favors which would lead them to co-operate with each other in the crime charged. (*Id.* at 395.)

The Court has examined each of the nine cases cited by the defendant and for one reason or another believes that these cases although interesting are inapplicable to the problem at hand.

First, defendant cites *United States v. Huddleston*, 811 F.2d 974 (6th Cir. 1987). In *Huddleston* the defendant was indicted for possessing and selling stolen videotapes. The government was allowed to introduce evidence

of the defendant's prior dealings in $28 television sets as bearing on the "[d]efendant's intent, plan, knowledge, or absence of mistake or accident in this case." *Id.* at 976. Both the television sets and the tapes at issue in the case were sold well below their value. Taken as a whole, the evidence indicated that the defendant had engaged in a pattern of illegal activity. The trial court's instruction included an admonition for the jury to consider the prior acts testimony only as it related to the permissible purposes under Rule 404(b). The Sixth Circuit found this evidence was admissible under a *preponderance of the evidence* standard. *Id.* at 976-77. The "clear and convincing" evidence standard was rejected. However, unlike the Vance case, *Huddleston* dealt with similar act evidence and not evidence as to motive.[1]

The defendant renews his reliance upon *United States v. Dunn*, 805 F.2d 1272 (6th Cir. 1986). In Dunn, the defendant was convicted of three counts of mail fraud for making false insurance claims after the intentional burning of six poultry buildings. *Id.* at 1276. The trial court admitted evidence that the defendant had stolen eggs prior to the fire for the purpose of showing the motive for burning down the buildings. However, the Sixth Circuit found that the only purpose for admission of the prior acts evidence was to show the reason why a contract was cancelled. *Id.* at 1282. Since the cancellation of the contract "was not a fact of consequence to the determination of the action," the evidence should have been excluded underd Rule 401. *Id.* On the other hand, in the case at bar the issue of *motive* was in issue and was a fact of consequence to the action. The relationship between Vance and the Kellys and the motive of Vance

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[1] *Huddleston* is presently before the U.S. Supreme Court. In a recent decision, *Bourjaily v. United States*, —— U.S. ——, 107 S.Ct. 2775 (1987), involving the admission of co-conspirator statements under F.R.E. 801(d)(2)(E), the Court adopted the preponderance test instead of the *clear and convincing* standard. This decision may well be a precursor to an affirmance of *Huddleston*.

in supplying a gun to Bonnie were essential components of the government's case.

Defendant cites *United States v. McFadyen-Snider*, 552 F.2d 1178 (6th Cir. 1977). In *McFadyen-Snider* the defendant was convicted on various wire and mail fraud counts and for making a false financial statement. Evidence of acts of prostitution and the giving of bad checks was admitted. The prostitution evidence was highly prejudicial and served no permissible purpose. *Id.* at 1182. However, the government asserted that the evidence of the bad checks was permissible in order to show bias or ill feelings by two witnesses. *Id.* at 1183. Since the witnesses testified on behalf of the government, the Sixth Circuit rejected this purpose and found that the evidence was not necessary for the prosecution's case and was highly prejudicial. *Id.* at 1184. Yet, in the present action the motive of Vance was a necessary part of the government's case. How could any jury understand or believe that a former assistant to a governor and an aide to a Speaker of the House would have any possible reason to assist Bonnie Kelly, without considering the alleged prior acts of the defendant with the Kellys?

The defendant relies upon *United States v. Phillips*, 599 F.2d 134 (6th Cir. 1979). In *Phillips* the defendant was convincted of bank robbery and evidence of his involvement in three prior bank robberies was admitted for the purpose of showing intent or plan. *Id.* at 136. Also, no limiting instruction was given to the jury about the proper purpose of prior act evidence. The Sixth Circuit found that the government had failed to show a "distinctive pattern" or other similarity which is needed to admit similar acts evidence of a common scheme or plan. *Id.* at 136-37. As a result, admission of the similar acts was reversible error because of the lack of a permissible purpose and the absence of a limiting instruction. In the case at bar, a limiting instruction was given and the evidence was admitted for the purpose of showing motive and not similar acts.

In *United States v. Perry*, 512 F2d 805 (6th Cir. 1975), the defendant was convicted of forging United States Treasury checks. The defendant testified on his own behalf and the government questioned him about prior instances of unauthorized check endorsements. The government stated that it questioned the defendant about these prior acts for purposes of impeachment. *Id.* at 807. Since the defendant had not put his character in issue and there was no proof of a prior conviction for these acts, the Sixth Circuit found the admission to be reversible error. Moreover, this case has no relevance to the present action because *Perry* was decided before the Federal Rules of Evidence were adopted. (*Perry* was decided on March 19, 1975, and the Federal Rules of Evidence did not become effective until July 1, 1975.)

The defendant cites *United States v. Schaffner*, 771 F.2d 149 (6th Cir. 1985). In *Schaffner* the defendant was convicted for obstruction of justice by counseling a witness to hide during the trial. The trial court allowed the government to introduce evidence of the defendant's previous state trial on destruction of evidence charges. The government asserted that the prior acts testimony was necessary to show *intent*. Shaffner had been tried for destruction of evidence in a state murder case wherein a young woman had been strangled and a pocket knife had been used in an attempt to decapitate the victim. *Id.* at 154. Since the lack of intent was not asserted as a defense, intent was not an issue at trial and there was no permissible purpose for its introduction into evidence. It was further held that the cautionary instruction given by the trial judge was not enough to render the evidence harmless in light of the gruesome circumstances of the prior murder case.

On the other hand, the motivation of Vance was at issue and the prior acts involved less serious offenses than those for which he was tried. Each of the prior bad acts admitted in the present action are pale in comparison to

the crime under consideration. Also, at no time did the defendant offer to stipulate that motive would not be disputed or that the related issue of intent would not be an issue. Unlike obstruction of justice, the intent element of supplying a murder weapon is not inferable simply by proof that the act occurred. In fact, counsel for the defendant strenuously argued in his closing that Vance had *no motive* or reason for giving Bonnie Kelly a gun. The limiting instruction given by this Court stated that all evidence of prior acts could not be considered for any purpose unless the jury finds beyond a reasonable doubt that the defendant committed the act charged in the indictment.

The defendant also relies upon *United States v. Blankenship*. 775 F.2d 735 (6th Cir. 1985). In *Blankenship* the defendant was convicted of receiving a firearm while under a disability as a convicted felon and of other related firearm offenses. The government introduced evidence of prior burglaries by the defendant in order to show predisposition and to rebut the defense of entrapment. *Id.* at 736. The Sixth Circuit quoted the *Ring* case mentioned above and stated that evidence of predisposition is permissible only when the other crimes are of a similar nature. *Id.* at 739. As a result, the other crimes evidence was not admitted for a permissible purpose because of the lack of substantial similarity. *Id.* at 740. However, in the present action the prior acts were admitted for the purpose of showing motive and not predisposition. No similarity requirement is imposed because the relevance of the prior acts goes to an issue other than the predisposition to commit crimes in general.

Our attention is also directed to the unpublished decision in *United States v. Huff*, No. 85-5504, slip op. (6th Cir. Feb. 28, 1986). In *Huff* the defendant police officer was convicted of violating various civil rights laws by aiding and abetting in the assault of a prisoner by other prisoners. The government was allowed to introduce evi-

dence of a previous incident in which the defendant allegedly used excessive force in making an arrest and was threatened with a civil suit. The stated purpose for the use of the evidence was to prove the defendant's motive in soliciting surrogate assailants. However, the Sixth Circuit found the prior incident "dissimilar in that it did not involve criminal conduct, it did not happen in a jail, and it apparently involved a confrontation with an armed man sought to be taken into custody." Also, it was the "only such episode involving alleged use of excessive force mentioned with respect to Huff."

In the case at hand many prior criminal acts were alleged to have been committed that involved the relationship of Vance with the Kellys. Although the admission of evidence concerning one isolated prior act, as in *Huff*, might be unfairly prejudicial, the cumulative effect of the prior acts was highly probative of the defendant's *motive*. In fact, Vance admitted that he had assisted the Kellys in the creation of false identification cards and had in his possession a machine gun that was registered to the Fayette County Sheriff's Department. Also, testimony revealed that a stolen machine gun was found on the Kellys' farm. Certainly, the admission of this evidence was prejudicial to the defendant. However, in light of its probative value on the issue of motive and the fact that many of the prior acts were supported by testimony of several witnesses, such admission was not *unfairly* prejudicial. The evidence went directly to the issue of Vance's motive in supplying a gun to Bonnie Kelly, the wife of his friend Mike Kelly.

The defendant cites the unpublished opinion of *United States v. Gibson*, No. 85-5356, slip op. (6th Cir. Feb. 19, 1986). In *Gibson* the defendant was convicted of possessing a firearm by a convicted felon. During the testimony of a government witness, the status of the defendant as an escapee was mentioned. The government did not support the admission of this fact by any permissible pur-

pose under Rule 404(b) and admitted that the reference to the defendant's escapee status was prejudicial. However, the government asserted that the inadvertence of the witness' statement indicated that such error was harmless. Since the evidence of the defendant's possession of a firearm was not overwhelming, the Sixth Circuit did not find that the reference to the defendant's escapee status was harmless error and the case was remanded for a new trial. The present action has no similarity to *Gibson* whatsoever. The government does assert a permissible purpose, the *motive* of Vance in supplying a gun to Bonnie Kelly.

The admission of prior bad acts into the evidence is always prejudicial to a criminal defendant. The question is whether the prejudicial effect was *unfairly* prejudicial. These bad acts did not result in defendant's conviction. The evidence of his guilt was overwhelming.

THE ALIBI

From the very beginning Mr. Vance made a conscious decision to provide Bonnie Kelly with an alibi. He was putting her in Lexington, Kentucky, at the very same time that she was actually shooting Eugene Berry down in cold blood at his home in Punta Gorda, Florida. Lexington is 1,000 miles away. The prospect of her omnipresence was not suggested at the trial.

The jury heard at first hand, as did the Court, Bonnie Kelly give a cold, calculated account of Mr. Berry's murder. She shot him as he invited her into his home and shot him again and again, coup de grâce, while he lay on the floor. The jury heard her recall how she prayed for strength to carry out the plan to pull the trigger—and probably wondered, as did the Court, to whom did she pray? She tried tuning up to cry at one point, but she could not bring up the first mist of a tear.

Now this was the woman and the brutal act that Mr. Vance attempted to shield from justice. It was not sug-

gested that he merely acted as her cavalier. He was accused of being a co-conspirator.

The defendant was interviewed on four occasions by Kentucky and Florida law enforcement officers. The jury heard the alibi in a tape recording of one of those interviews.

Vance's tone was adamant. First, he told the officers that he saw Bonnie Kelly on Friday, January 15, 1982, in Lexington for the purpose of having her sign an insurance form. No question about it. He then, on every occasion, told the officers that he saw Bonnie Kelly the next day, Saturday, January 16, 1982, in the early evening—the day and time of the murder. And the way that he was able to pinpoint this encounter, was to tie it to a University of Kentucky home basketball game at Rupp Arena in Lexington, Kentucky. He was on his way to get a baby sitter and saw Bonnie Kelly. This tie-in with the basketball game was the defendant's undoing. It added credibility to his recollection, although he could not remember the opponent.[2]

The Court wondered at the time why the defendant had not referred to his schedule to ascertain the opponent that night in order to refresh his memory and reconstruct his activities for the evening of the murder. His approach was far too casual for a highly placed individual who was intentionally making himself an alibi witness. His passing disclaimer, "to the best of my recollection," became totally unimportant.

Why would a man in the defendant's position attempt to give Bonnie Kelly an alibi? Why would a man of his background of privilege and opportunity—his high

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[2] The University of Kentucky played *Alabama* in Rupp Arena in the evening of January 16, 1982, and won the game in a convincing manner. The final score was 86-69. Usually one recalls, within thirty days, home wins over Alabama.

position in state government—a man perceived as a community pillar—interject himself into a *murder* investigation in such a manner? This question, "why" is most difficult to *understand.* The answer is not.

There had to be motivation of a most urgent nature. Mike Kelly was his friend, even though Bonnie was not. Mike Kelly had been his friend and confederate in crime for a decade. And by his own admission he was not sympathetic with Mike's prosecution in Florida. The defendant knew, or had every reason to know, that the alibi was a lie. The bad acts admitted in the record are pale in comparison to the allegation that Henry Vance gave Bonnie Kelly the murder weapon knowing it was to be used in a senseless killing. This had to be the motivation for the jury to believe that the defendant was guilty.

THE "ACCIDENT"

A part of the web spun by the government involved an accident that was staged in Lexington around midnight on the night of the murder. A co-conspirator, Stephen Vance Taylor, testified that the defendant came to Mike and Bonnie Kelly's home and helped plan and execute an automobile accident in which Taylor was supposedly injured. The defendant helped Taylor cut and scrape the latter's face to make it appear that he was injured enough to require his hospitalization. Mike's brother, John Kelly, and Mike's present wife, Betty, testified to being with Taylor and helping Vance with the "accident." The accident was investigated by the police and Taylor was taken to a local hospital. Records were introduced to corroborate the occurrence. Government witnesses described Henry Vance as the moving force. He actively participated in the planning and execution.

There were compelling reasons for Stephen Vance Taylor to be hospitalized that weekend. First, he participated in the conspiracy to murder Eugene Berry. He needed an alibi. Around midnight, Bonnie Kelly was at a motel in

Sarasota, Florida. She called home and left a chilling message on the answering machine—"It's done." It was alleged that the message was replayed that same night for Henry Vance. Secondly, Taylor was scheduled to stand trial in Florida on Monday to answer a drug related charge and Berry was to be the prosecutor.

What a surprise when the Court and jury heard the defendant *admit* being at the Kelly residence at that time in the middle of the night.

His version was somewhat different. He testified that after the ballgame he and his wife had retired for the evening when he received a telephone call from Mike Kelly's brother. He was told that an emergency existed and he was needed at once. Without requiring any further explanation Vance left his bed and went to the Kelly home. Vance testified that he was asked to help stage an accident so that Taylor would have an excuse not to be in Florida the following Monday. Vance refused and returned to his home.

The inferences that can be drawn from the defendant's own version, even if believed, point unerringly to his guilt.

First of all, why would experienced criminals like Stephen Vance Taylor and John Kelly need the assistance of an upstanding citizen (Henry Vance) to stage an accident?

What was there in the defendant's past association with these people that would make them *think* that Henry Vance, or any person in his position in the community, would act in conformity with their request? Why would they *think* that he would leave the warmth and comfort of his bedchamber, in the middle of a snowy night, without any explanation, to listen to their bizarre scheme?

Did they not tell Vance that Bonnie was in Florida? Or that she had called back and left the message, "It's

done." There was testimony that they did. Vance denied it. One can reasonably infer that he was told.

It should be again noted that the defendant was interviewed by the authorities on at least four occasions and never once did Vance tell the officers about the "accident" scheme. At the last interview at his home, he *denied* any knowledge of it.

No question about it, the defendant's conviction came from his *admitted* conduct. The bad acts testimony had little to do with it.

THE ROBERT DAVIES WALLET

A wallet was recovered by the police that contained a driver's license that appeared to belong to one Robert Davies but carried the defendant's picture. It was a fake. The wallet also contained several other identification cards including a social security number supposedly issued to the same Robert Davies. It was found by other people by pure chance and was not obtained as a direct result of this prosecution.

The government attempted to prove that the fake driver's license was used to negotiate a $16,500.00 check for defendant's friend, Andrew Thornton, who was a fugitive from justice at the time. The check was used to open a bank account in Tennessee.

Bonnie Kelly testified that she, her husband and Vance caused these fake i.d.'s to be made up to further their criminal activity. False identification is typically used in a variety of ways by criminals and is not usually resorted to by well bred and law abiding citizens.

The defendant explained the fake driver's license by saying that when he was a deputy sheriff (1969-1973), he was involved in a number of drug related arrests and since leaving office he was accosted on at least one occasion by one of his prior arrestees. He therefore needed

proof of another identity to extricate himself in such times of confrontation.

The license bears an application date of February 20, 1981, *eight* years after his separation from the Sheriff's office, and an expiration date of February, 1985. Vance's excuse was feeble at best. And the jury had ample room to hold the defendant to the more serious inferences. These documents served to corroborate the testimony of Bonnie Kelly and were admissible.

OTHER OBJECTIONS

Beyond the arguments surrounding Rule 404(b), the motion for new trial includes quite a number of assignments of error—too numerous to mention. Except for two.

MS. GINGER JOHNSON

During the defendant's testimony he attempted to put as much distance as possible between himself and the Kellys. On cross examination he had to admit that he had used the Kelly home as a rendezous to meet Ms. Ginger Johnson. He was married at the time. Well into the testimony of this meretricious affair, counsel objected. The Court *promptly sustained* the objection. No admonition was requested.

In retrospect, it is believed that the Court may have erred in defendant's favor. A re-reading of *White* leads us to the conclusion that this titillating line of questioning was most illustrative of the close relationship between Vance and the Kellys.

THE CHARGE TO THE JURY

Finally, the defendant complains that the Court's charge to the jury was erroneous in that the "bad acts" charge was in error. We have already dealt with that question. Complaint is further made that the Court failed to include defendant's requested charges. One instruction

deserves special attention and was to instruct the jury that even if they believed, beyond a reasonable doubt, that the defendant was guilty as charged, but yet if they were not in "smypathy" with the government's case they could return a verdict of not guilty. The Court declined to so charge the jury.

This request was unreasonable. It would have meant that although the jury believed to the exclusion of a reasonable doubt that Henry Vance gave Bonnie Kelly a pistol for the sole purpose of the vengeful killing of Eugene Berry they could turn him loose if they lacked "sympathy" for the prosecution of that murder. This proposed charge has been approved in the past. No authority has been cited to the Court where it would have been prejudically erroneous to refuse it. It would have been impermissible for the Court to have even considered it in this instance.

For the foregoing reasons, and the Court being sufficiently advised,

IT IS THEREFORE ORDERED that defendant's motion for judgment of acquittal and for new trial be, and the same are hereby DENIED.

This 20th day of November, 1987.

/s/ Henry R. Wilhoit, Jr.
HENRY R. WILHOIT, JR.,
Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil Action No. 87-3

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HENRY VANCE,
Defendant.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on plaintiff's motion for pre-trial ruling on admissibility of certain evidence and defendant's motion in limine against admission of certain of the plaintiff's exhibits.

FACTS

The defendant, Henry Vance, was indicted on charges of conspiracy to transport in interstate commerce a firearm with knowledge and intent to commit a felony offense and aiding and abetting the transportation of a firearm in interstate commerce. *See* 18 U.S.C. § 924(b); 18 U.S.C. § 371; 18 U.S.C. § 2. The defendant allegedly furnished an unindicted co-conspirator, Bonnie Lynn Kelly, with a .38 caliber pistol for the purpose of traveling to Florida to murder Eugene Berry, a state prosecutor there. In order to have an understanding of the matters before the Court, it is necessary to examine the personal profile of the defendant and his relationship with various unindicted co-conspirators.

The defendant is from an upper middle class, central Kentucky family. He has risen to social and political prominence as an aide to a former governor of the Commonwealth of Kentucky and an assistant to a former Speaker of the Kentucky House of Representatives. On the other hand, his open association with various other individuals who have been either convicted or charged with various criminal offenses (including murder and drug offenses) presents somewhat a curious anomaly to his general reputation. The government seeks to admit evidence of many of these relationships with suspected or convicted criminals in order to prove a *motive* for the pending charges. Also, the government claims that this background information is "inextricably intertwined" with the its evidence of the offenses charged.

The government alleges in the early 1970's that as a deputy sheriff in Fayette County, Kentucky, the defendant became associated with Andrew "Drew" Thorton who was at that time a fellow officer on the "Narcotics Unit". Both Thornton and the defendant became associated with Wallace McClure Kelly, better known as "Mike Kelly" and his wife, Bonnie Kelly. Vance is alleged while as a deputy sheriff to have forged the name of the Fayette County Sheriff in order to try to obtain twenty-five .44 magnum revolvers and that the defendant, Thornton, and the Kellys engaged in various criminal activities together.

Bonnie Kelly allegedly helped the defendant substitute fake LSD for real LSD held in evidence in pending criminal cases so the defendant could then sell the real LSD. Also, between 1974-1976 Mike and Bonnie Kelly are alleged to have broken into various drugstores around Lexington, Kentucky and stolen drugs for the personal use of the defendant. The government also alleges that the defendant stole a machine gun from the sheriff's office in the early 1970's and gave it to Mike Kelly for safekeeping.

Further, in 1972 Vance, Thornton, and the Kellys are acused of building and activating a bomb at the residence of the Fayette County Judge who now sits as Chief Justice of the Kentucky Supreme Court. In 1980 Vance and the Kellys allegedly stole a machine gun from the trunk of a vehicle in the impoundment lot of the police department. Also, in 1981 Vance and Mike Kelly are accused of illegally manufacturing silencer parts for guns and altering weapons to fire automatically as machine guns.

Mike Kelly was charged and convicted of trafficking in marijuana in excess of 10,000 pounds on June 3, 1981.[1] Moreover, as overt acts in the current indictment, the government alleges that between December 23, 1981 and January 16, 1982, the defendant, Stephen Vance Taylor, and Bonnie Kelly planned and discussed the killing of the Florida state prosecutor, Eugene Berry, who had successfully prosecuted Mike Kelly, and a material witness named Linda Bailey. On January 11, 1982 Vance allegedly agreed with Bonnie Lynn Kelly to arrange the murders for $35,000 cash. On January 14, 1982 Vance allegedly returned a $10,000 down payment to Bonnie Kelly and told her that he could not make arrangements to have Berry and Bailey killed but that he would help her if she wanted to kill one of them.

The government next alleges that on January 15, 1982, the defendant furnished Bonnie Kelly with a handgun for the purpose of killing the Florida prosecutor, Berry, and on that same day she shot and killed him in Charlotte County, Florida. The government says that its proof will show that the defendant advised her to wipe the gun with WD-40 and throw it in saltwater in Florida so that no fingerprints would be found. Further, on January 16, 1982, Vance and John Kelly allegedly helped Stephen Vance Taylor stage an accident to give him an alibi for

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[1] This conviction was reversed and the case remanded for a new trial in *Kelly v. State*, 425 So.2d 81 (Fla. Dist. Ct. App. 1982).

the murder. Further, between January 17, 1982, and April 1, 1982, the defendant allegedly had several discussions with Bonnie Kelly and advised her that Stephen Vance Taylor should be killed because of his knowledge of the murder and that she should steal the records to the K-Mart store where the ammunition for the gun was purchased. Finally, on January 26, 1982 and March 20, 1982 the defendant allegedly provided false information to law enforcement officials that he had seen Bonnie Kelly in Lexington on January 16, 1982.

Bonnie Kelly was convicted in Florida state court for murder and received a life sentence without the possibility of parole for 25 years. Steven Vance Taylor pleaded guilty to second-degree murder and was sentenced to 99 years in prison on the murder charge and 15 years on an earlier drug charge that Berry had prosecuted.

The defendant was indicted on January 12, 1987.

MOTION IN LIMINE

The defendant in his motion in limine objects to the following proposed government exhibits:

17. Wallet of Robert Davies and contents

23a. Letter from Gall's Police Equipment

23b. Order form from Galls

23c. Letter to Gall's Police

35. Accident Report

36. Taylor Medical Records

37. Courier Journal 4/15/87

38. A.P. State Journal 4/14/87

39. Lexington Herald 4/14/87

42. & 43. Portions of taped interview (object as irrelevant)

44. List of telephone numbers and identification.

Each document is objected to as irrelevant and immaterial. Exhibits 23a, 23b, 23c, and portions of 42 and Exhibit 44 are objected to as a violation of Fed. R. Evid. 404 and 405. In addition, Exhibits 23a, 23b, 23c, 37, 38, and 39 are objected to as hearsay.

Moreover, the defendant's Motion in Limine concerns many of the same matters addressed in the government's Motion for Pre-Trial Ruling. As a result, the rulings on the defendant's motion will be addresed after the discussion of the government's motion below.

MOTION FOR PRETRIAL RULING ON ADMISSIBILITY OF CERTAIN EVIDENCE

The government in its motion for pretrial ruling attempts to seek the admission into evidence of the following prior bad acts:

1. Evidence of drug use by defendant in early 1970's
2. Creation of "fake" LSD by defendant and Bonnie Kelly
3. Theft of machine gun by Vance in early 1970's and safekeeping by Mike Kelly
4. Theft of drugs through drugstore burglaries by the Kellys to supply drugs for the defendant's personal use
5. Bombing at the residence of a county judge in 1972 by Vance, Thornton, and the Kellys
6. Theft of a machine gun in 1980 by Vance and the Kellys
7. Illegal manufacture in 1981 of silencer parts and altering of weapons into machine guns by Vance and Mike Kelly
8. The making of false driver's licenses by the Kellys, specifically false driver's licenses of Mike Kelly found upon his arrest on June 29, 1981,

false driver's license found on Drew Thornton, false driver's license of Robert Davies bearing the photograph of Vance

9. Ordering of twenty-five .44 magnums by Vance in 1973 by forging sheriff's signature.

Since many of the objections contained in the defendant's motion and all of the objections to the government's prior bad acts evidence relates to Fed. R. Evid. 404(b), the Court will first address the appropriate test of admissibility of such evidence.

Generally, the admission of other crimes evidence requires the satisfaction of a two-part test. *See United States v. Huddleston*, 811 F.2d 974, 976 (6th Cir. 1987). First, the evidence must serve a permissible purpose such as one of those listed in the second sentence of Rule 404 (b). *Id.* Additional considerations for this part of the test include whether the evidence relates to a matter "in issue," and deals with conduct "substantially similar and reasonably near in time to the offenses for which the defendant is being tried." *See United States v. Blankenship*, 775 F.2d 735, 739 (6th Cir. 1985) (citing *United States v. Ring*, 513 F.2d 1001, 1005 (6th Cir. 1975).

Since the enactment of the Federal Rules of Evidence, these additional considerations are "still of assistance" but, however, were not intended to operate as a "rigid checklist in every case." *United States v. Czarnecki*, 552 F.2d 698, 702 (6th Cir. 1977). Rule 404(b) is a "rule of inclusion rather than exclusion," because only one purpose (use of character evidence to show that the defendant acted in conformity therewith) is forbidden. *Blankenship* at 739.

Second, after a determination of a permissible purpose, the Court must determine if "its probative value is substantially outweighed by the danger of *unfair* prejudice". Fed. R. Evid. 403; *Huddleston* at 976; *Blankenship* at 739; *Czarnecki* at 702.

Finally, in a recent case, the Sixth Circuit has adopted the preponderance of the evidence standard for admission of proof of prior bad acts. *Huddleston* at 976; *United States v. Ebens*, 800 F.2d 1422, 1432 (6th 1986). As long as the "aggregate of the evidence" permits a finding "beyond a reasonable doubt," individual proof of prior bad acts is admissible if a preponderance of the evidence shows that the defendant committed the act. *See Huddleston* at 976; *See also Ebens* at 1432.

The defendant primarily relies upon *United States v. Dunn*, 805 F.2d 1275 (6th Cir. 1986), as authority for the position that in this instance admission of any of the prior bad acts would result in the improper purpose of showing character or propensity. In *Dunn* prior acts of the defendant in stealing eggs was admitted to reinforce certain testimony relating to charges of intentionally setting fire to a building and committing mail fraud. *Dunn* at 1280. The purpose of the prior acts testimony was to reinforce the "real reason" why a contract was cancelled. *Id.* at 1282. However, the contract issue "was not a fact of consequence to the determination of the action" and the Sixth Circuit rejected the prior acts as failing to be relevant evidence. *Id.* at 1281-82. "While the question whether Delight did or did not have a motive to burn down the building was 'of consequence' to the case, the *reason why* the contract was cancelled was not a matter seriously in controversy and certainly not a matter of any consequence to the determination of the prosecution." *Id.* at 1282 (emphasis in original).

The government primarily relies upon *United States v. White*, 788 F.2d 390 (6th Cir. 1986), as authority for its admission of the prior bad acts in the case at bar.[2]

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[2] Although the government additionally argues that the prior acts should be admitted as "inextricably intertwined" with the facts of the crime itself, the Court is hesitant to adopt this theory when no Sixth Circuit opinion is cited for authority. *See United States v. Mills*, 704 F.2d 1553 (11th Cir. 1983), *cert. denied*, 467 U.S. 1243 (1984) (11 opinions from other circuits are cited).

In *White* the defendant was convicted of interfering with the housing rights of a black family by burning down a house under construction. *Id.* at 392. The District Court admitted evidence concerning the kiting of checks and the making out of fraudulent American Express charges in order to allow the government to "*set up the scene.*" *White* at 393 (emphasis added).

As in the case at bar, the evidence of the bad acts (prior financial dealings) went to the question of *motive. Id.* "For example, White's willingness to admit to phony American Express charges for Castile tends to explain *why* Castile would be asked and would—without pay—want to help White with his 'problem.'" *Id.* (emphasis added).

Likewise, in the case at bar the government desires to "*set the scene*" for the *motive* of the defendant, a man of social and political prominence, to supposedly supply a weapon to a confederate to murder a state prosecutor. Much of the government's prior act evidence attempts to show *why* the defendant would risk this high social and political prominence by becoming involved in a murder. Any murder! The alleged criminal relationship between the unindicted co-conspirators and Vance is probative on the issue of *motivation* in the transfer of the pistol. There is little question that much of the prior act evidence, such as the furnishing of guns to the Kellys and the creation of "fake" LSD by the defendant and Bonnie Kelly is prejudicial to the defense. However, the burden is on the Court to determine if this prejudice is *unfair.* The jury must decide whether to believe the testimony of the defendant or the testimony of the Kellys. If the jury does not believe that Vance gave the gun to Bonnie Kelly to commit a murder,[3] then they will not believe the testimony of the Kellys as to prior bad acts. Either all of the evidence about the murder weapon and the prior

[3] The motive of giving the gun for this illegal purpose is in sharp contrast to any innocent reason for furnishing the weapon.

acts will be believable or all the evidence will be rejected by the jury.

PRE-TRIAL EVIDENCE RULINGS

Applying the above principles to the defendant's motion in limine, the Court finds that Exhibits 17, 35, 36, and 44 are admissible and that Exhibits 23a, 23b, 23c, 37, 38, and 39 are inadmissible. The taped interview, Exhibits 42 and 43, are admissible subject to redaction as previously indicated by the Court. The wallet of Robert Davies and its contents are admissible as they relate to any connection between the conduct of the defendant and the Kellys. The accident report and the medical records are admissible as highly probative of an action to cover up any conspiracy as to the death of Eugene Berry. Further, the telephone records and identification are relevant to the modus operandi of the defendant in association with the Kellys.

However, the information relating to the .44 magnums is not relevant to the issue of motive since the government alleges that Vance carried out this act by himself. The newspaper articles are inadmissible hearsay and any evidence contained in such articles can only be elicited from the individual reporters.

Moreover, the application of the two-part test for prior bad acts testimony results in the following rulings. First, evidence of the defendant's drug use in the early 1970's and the theft of drugs is inadmissible as unfairly prejudicial. Although such evidence is somewhat probative of the motive of Vance to act in connection with the Kellys, the prejudicial effect of the extensive drug use outweighs any use of the evidence. Second, the creation of "fake" LSD by Vance and Bonnie Kelly is highly relevant to the issue of motive. While proof of sale of the LSD is permissible in connection with this prior act, any proof of use of the LSD by Vance is inadmissible and the government should carefully limit testimony in this area.

Third, evidence of the theft of machine guns, manufacture of silencer parts, and altering of automatic weapons is admissible as it relates to the motive of Vance to act in connection with the Kellys. Also, such evidence is substantially similar to the transfer of the gun in the present action. On the other hand, evidence of the attempt of Vance to obtain the twenty-five .44 magnums is inadmissible as both too remote in time and lacking any connection with the stated purpose of the government in using prior act testimony to show motive between Vance and the Kellys. While the obtaining of guns is somewhat similar, there is no action alleged by Vance to furnish the guns to any unindicted co-conspirators.

Fourth, proof of the bombing of the home of the county judge is admissible as indicative of the relationship between Vance and the Kellys. Although somewhat remote in time, the bombing provides an initial indication of the alleged willingness of the defendant to act in concert with the Kellys. Fifth, evidence tending to show a plan for the Kellys and Vance to create false identifications is admissible both for proof of motive and modus operandi.

Of course the admission of proof of prior bad acts will result in a limiting instruction such as is suggested in *Weinstein's Evidence* ¶ 404[08] at page 404-59. The Court will not permit any use of prior acts testimony for any reasons other than the permissible purposes listed above. Also, when prior acts testimony is expected to be elicited that may be questionable in meeting the preponderance of the evidence standard, counsel must so indicate to the Court prior to such testimony to allow a proffer of the evidence outside of the presence of the jury.

Accordingly,

IT IS THEREFORE ORDERED AND ADJUDGED:

(1) that plaintiff's exhibits 17, 35, 36, and 44 are found admissible for the reasons stated above and defendant's objections to such exhibits are OVERRULED;

(2) that plaintiff's exhibits 23a, 23b, 23c, 37, 38, and 39 are inadmissible for the reasons stated above and the defendant's objections are SUSTAINED;

(3) that plaintiff's exhibits 42 and 43, are admissible subject to redaction as previously indicated by the Court;

(4) that the following prior bad acts are found admissible for the reasons stated above:

1. Creation of "fake" LSD by defendant and Bonnie Kelly
2. Theft of machine gun by Vance in early 1970's and safekeeping by Mike Kelly
3. Bombing at the residence of a county judge in 1972 by Vance, Thornton, and the Kellys
4. Theft of a machine gun in 1980 by Vance and the Kellys
5. Illegal manufacture in 1981 of silencer parts and altering of weapons into machine guns by Vance and Mike Kelly
6. The making of false driver's licenses by the Kellys, specifically the false driver's licenses of Mike Kelly found upon his arrest on June 29, 1981, false driver's license found on Drew Thornton, false driver's license of Robert Davies bearing the photograph of Vance;

(5) that the following prior bad acts are found inadmissible for the reasons stated above:

1. Evidence of drug use by defendant in early 1970's
2. Theft of drugs through drugstone burglaries by the Kellys to supply drugs for the defendant's personal use
3. Ordering of twenty-five .44 magnums by Vance in 1973 by forging sheriff's signature.

This 20 day of October, 1987.

/s/ Henry R. Wilhoit, Jr.
HENRY R. WILHOIT, JR.,
Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 87-6276

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HENRY VANCE,
Defendant-Appellant

ORDER

[Filed June 6, 1989]

BEFORE: JONES and RYAN, Circuit Judges; and GIBSON,* United States District Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN,
Clerk

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* Hon. Benjamin F. Gibson sitting by designation from the Western District of Michigan.